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In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, et al.,

Petitioners,

v.

KELLY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AD HOC COMMITTEE OF FORMER JUSTICES AND FRIENDS DEDICATED TO AN INDEPENDENT JUDICIARY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS SUPPORTING AFFIRMANCE

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INTEREST OF AMICUS CURIAE[1]

The Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary ("AHC") is a group of former state Supreme Court Chief Justices, Justices and others[2] dedicated to preserving the independence of and impartiality of the judiciary. The AHC offers this Court a unique perspective on Minnesota's Canon 5 that comes from its members' collective experience on the

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[1] Pursuant to Rule 37.6 of this Court, *amicus curiae* states that no party had any role in writing this brief and that no one other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties.

[2] The Co-Chairs of the AHC are Former Chief Justice of the Texas Supreme Court, John L. Hill; Former Chief Justice of the Minnesota Supreme Court, A.M. (Sandy) Keith; and Former Chief Justice of the California Supreme Court, Malcolm Lucas.

The AHC members are: Former Chief Justices of the North Carolina Supreme Court, James G. Exum, Jr. and Henry E. Frye; Former Chief Justice of the Washington Supreme Court, Robert F. Utter; Former Chief Justice of the Utah Supreme Court, Michael Zimmerman; Former Associate Judge of the New York Court of Appeals, Stewart F. Hancock, Jr.; Former Minnesota Governors Wendell Anderson and Arne Carlson; Former President of the American Bar Association, R. William Ide III; Counsel for the Georgia Judicial Qualifications Commission, James Rawls; Member of the Judicial Inquiry Commission of Alabama, J. Mark White; Professor of Law at Northern Illinois University College of Law, James Alfini; Professor of Political Science at the University of Texas at Dallas, Anthony Champagne; Professor of Law and Director of the Thomas Jefferson Center for the Protection of Free Expression at The University of Virginia, Robert M. O'Neil; and Senior Vice-President, Chief Administrative Officer/General Counsel, Detroit Medical Center, Conrad Mallett, Jr.

The organizations that the AHC Members belong to are listed for identification only.

bench. Some of the AHC's members are former chief justices and justices who have campaigned for elective judicial office and therefore have an educated opinion that there will be a negative impact on the judiciary should a judicial candidate be permitted to "announce his or her views on disputed legal or political issues." Others of the AHC's members are former chief justices and former justices who have served on courts which do not select their members by elections, but, based on their experience, have an educated opinion that most of the public does not make fine distinctions about the way a judge acquired his or her position, so a negative impact on the elective judiciary will lead to a negative impact on all judges, whether elected or appointed. Other members of AHC are former governors of Minnesota, representing both major parties. The former Minnesota governors have a particular dedication to Minnesota's ninety year history of a non-partisan, non-political judiciary.[3] All of the AHC's members believe that a negative impact on our

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[3] Although the issues decided below about party endorsements are not under review, Minnesota's deep tradition of nonpartisanship was reflected when Petitioner Wersal, in 2000, sought party endorsement. At that time, Chief Justice Katherine Blatz wrote to the state party chairman saying "I am not seeking, nor will I accept," a party endorsement. *See Party Snubs Incumbents on Minnesota Supreme Court*, ST. PAUL PIONEER PRESS, June 11, 2000, at 8A; Plaintiff Wersal's Affidavit, paragraph 22 and his Exhibit I in *Wersal v. Lundberg*, No. 00-11685 (D. Minn. 2000).

Chief Justice Katherine Blatz has served as a Republican State Representative from 1979-1994, and as Assistant Minority Leader from 1987-1990 and in 1993.

state judiciary will also damage public confidence in federal judges.

In recent years there has a been a "noticeable trend toward more judicial speech" which the dispute at bar highlights. David M. O'Brien, *Preface*, JUDGES ON JUDGING: VIEWS FROM THE BENCH xv-xvi (1997) (citing Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805 (1995)). At the same time, however, "there remains a firmly entrenched view . . . that judges should remain wholly 'above the fray,' and avoid revealing any of their beliefs or fundamental values to the public" because they may be faced with deciding those previously unresolved questions in subsequent judicial proceedings. *Id.* at xvi. The AHC agree with this latter position, adopting Justice Felix Frankfurter's "judicial lockjaw" concept, whereby judges limit their off-the-bench comments to avoid the appearance of prejudging an issue that might come before them. *Id.* at xiv. The AHC is also concerned that a failure to uphold Minnesota's Canon 5 will impair the Due Process rights of litigants and violate the separation of powers doctrine.

SUMMARY OF THE ARGUMENT

Minnesota's Canon 5 makes good policy sense. It ensures that a judge, once elected, will not be pressured to decide a case based on a campaign promise when the law and the facts of a particular case dictate a ruling contrary to that promise. The Canon also allows judges to remain impartial and independent from partisan politics and special interest coercion. The decision in this case

may affect the confirmation process of the federal judiciary: without canons similar to this one, when the Senate requests that a nominee articulate a position on an issue that may cause the nominee to prejudge a case, the nominee may be forced to answer. Further, if this Court were to produce a broad decision overturning the Eighth Circuit, it would impact not only states that use the elective process, but also systems that use a purely appointive process for judicial selection. Additionally, should this Court fail to uphold the Canon and issue a broad opinion overturning the Eighth Circuit, it would have effects beyond the confirmation process; in fact, it could even extend to post-confirmation inquiries and conduct.

The judiciary's role in the tripartite framework of American government involves neutrally reviewing the actions of the states and the other two branches of Government. No other branch of government has this power. Because of the judiciary's unique role in the administration of justice, Minnesota has an interest in preserving the independence of and impartiality of the institution. In order to maintain the intent of the checks and balances system set up in the federal and state constitutions, the judiciary must remain independent and neutral. The Tenth Amendment gives Minnesota the power to create special rules limiting a judicial candidate's First Amendment rights to meet this compelling state interest.

The Announce Clause in Minnesota's judicial Canon balances, on the one hand, the First Amendment interests of judicial candidates and their views on "disputed legal or political issues," and, on the other hand, the due process rights of litigants, the public's confidence in

judges' open-mindedness, and the states' interest in preserving an effective separation of powers. Therefore, Canon 5 passes constitutional muster because it is narrowly tailored to meet two unique, compelling state interests. First, Minnesota has a compelling state interest in maintaining the integrity of its judiciary and in ensuring the public's confidence in an independent judiciary. The Announce Clause is narrowly tailored in that it ensures that a judicial candidate remains neutral on issues that may come before his or her court in the future, but it does not limit a candidate's right to speak about a particular judicial philosophy, the role of the courts, or the duty to uphold the law.

Further, Minnesota has a compelling state interest in preserving the Due Process rights of its litigants. Civil litigants and criminal defendants alike have constitutional rights to an impartial judge, and the Announce Clause protects these rights. Measures similar to this Canon, when narrowly designed to preserve the right to a fair trial, have been upheld as constitutional. Minnesota's Announce Clause is similarly based upon the compelling state interest of protecting the Due Process rights of litigants and should be upheld.

ARGUMENT

I. Sound Public Policy Arguments Support Affirmance of the Eighth Circuit's Opinion.

The AHC, in part made up of former chief justices and justices of various state supreme courts, is concerned about societal perceptions that the judiciary is biased.

Many members of the AHC understand the pressures and conflicts elected judges face daily in making their rulings. All members of the AHC are concerned that a loss in confidence in the elected judiciary will infect the non-elected judiciary, including the federal judiciary.

A. If a judicial candidate is permitted to essentially make campaign promises *via* announcement of his views, when the law and facts of a particular case obligate him to make a contrary ruling as a judge, he will face internal conflict between the promise he made to the public and the obligations of his oath to follow the law.

If a judicial candidate is permitted to essentially make campaign promises *via* announcement of his views, when the law and facts of a particular case obligate him to make a contrary ruling as a judge, he will face internal conflict between the promise he made to the public and his oath to follow the law. Moreover, the announcement of a judicial candidate's views on particular issues gives, at best, the appearance that a candidate has prejudged a case. The existence of a perception that a judge has prejudged a case hurts the independent and impartial image of the judiciary, regardless of the eventual outcome reached in a case by a particular judge. Although most judges are aware of their duties to independently decide cases that come before them in accordance with the laws of the jurisdiction and not based on any bias or commitments made to campaign supporters, there will also likely be some judges who will not be able to rule impartially after announcing their views on a topic, due to political pressures. Thus, at its worst, this practice pressures

judges to ignore the law in cases involving matters upon which they have made campaign promises.

The Framers intended for the judiciary to be independent and free from this type of influence. *See Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 58 (1982) (explaining that the Framers stressed the importance of judicial independence because otherwise, "there would be too great a disposition to consult popularity"). As a result, the judicial oath of office requires a judge to follow binding precedent and authority, whether he agrees with the law or not. However, if Canon 5 is rejected, the potential exists, especially in a close case, for a judge to be tempted to find ways to distinguish otherwise applicable law to lead to a result that is consistent with his announced views.

To avoid putting a judge in the awkward position of explaining to the public why he or she departed from a stated position in a particular opinion, to avoid the perception that judges prejudge cases, and to avoid tempting judges to "shape" the law to meet campaign promises, Canon 5 does not permit the members of the judiciary to announce their views.

Once the integrity of the judiciary is undermined in states with elective systems, it will not be long before the integrity of the judiciary in non-elective systems is also undermined, since the public does not make fine distinctions based on how a judge is selected. The AHC urges this Court to uphold the constitutionality of Canon 5 by deferring to the Minnesota Supreme Court and affirming the Eighth Circuit's decision.

B. Invalidating the Announce Clause of Minnesota's Canon 5 may also have a negative effect on the selection process for federal judges.

An invalidation of Minnesota's Canon 5 may also have an unanticipated, but profound, impact on the selection process for the federal judiciary. Nominees for the federal bench decline to answer questions about their views on specific, substantive issues during confirmation hearings, explaining that a response might cause them to prejudge an issue that could come before him or her on the bench.[4] This measured response stems, in part, from

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[4] For example, Justice Scalia stated in his confirmation hearing:

> Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused on having a less than impartial view of the matter.

The Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 99th Congress, Second Session, Serial No. J-99-119, p. 37 (Aug. 5-6, 1986).

Other Justices have made similar statements:

> [I]n one sense we are all the product certainly of our experiences. People assume the role of a judge is encumbered, if you will, by the product of those experiences. Judges do, I suppose, as has been pointed out, read newspapers and listen to radio and watch television to some extent, so all are influenced to some greater or lesser degree by those experiences.

the fact that judges may be disciplined for failing to conduct themselves in a manner that promotes public

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> However, the framework within which a given case is decided, in my view, should be limited to the record and to the briefs and the arguments, and should not really be resolved on the basis of outside social concerns, if you will.

The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 97th Congress, First Session, Serial No. J-97-51, pp. 193-194 (Sept. 9-11, 1981).

> Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.
>
> Judges in our system are bound to decide on concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present. A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.

The Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 103rd Congress, First Session, Serial No. J-103-21, p. 52 (July 20-23, 1993).

> A judge is not a politician. A judge rules in accord with what the judge determines to be right. That means in context of the particular case, based on the arguments the parties present, in accord with the

confidence in the integrity and impartiality of the judiciary. *See* Leonard Gross, *Judicial Speech: Discipline and the*

> applicable law and precedent. A judge must do that no matter what the home crowd wants, no matter how unpopular that decision is likely to be. If it is legally right, it is the decision that the judge should render. And I also said what a judge should take account of is not the weather of the day, but the climate of an era.

Id. at 303.

> [I]t is important for any of us who are judges, in areas that are very deeply contested, . . . we have to look ourselves in the mirror and say: Are we impartial or will we be perceived to be impartial? I think that to take a position would undermine my ability to be impartial, and I have attempted to avoid that in all areas of my life after I became a judge.

The Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 102nd Congress, First Session, Serial No. J-102-40, p. 178 (Sept. 10-16, 1991).

Finally, Justice Souter provided this explanation for why he could not respond to certain questions during his nomination hearing:

> Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have, should be off limits to a judge. . . .
>
> Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? . . . [I]t is much easier to modify an opinion if one has not already stated it would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people? You understand the compromise that that would

First Amendment, 36 SYRACUSE L. REV. 1181, 1205 (1986). Nevertheless, Senators have recently become more aggressive in their probing at confirmation hearings, and the AHC submits that a reversal of the Eighth Circuit's decision *via* a broad dismantling of the Announce Clause will give these members of the Senate a tool by which they can force a nominee to answer questions about his personal views on various issues. For example, Chuck Schumer, a Democratic Senator from New York and head of the Judiciary Committee's Subcommittee on Federal Courts, has openly stated that the Senate should consider a judicial nominee's ideology as part of the confirmation process. *See Interview with Congressman Jonathan Kyl*, (Fox News television broadcast, Jul. 28, 2001) (transcript *available in* 2001 WL 7785874) (showing a video clip of Senator Schumer stating "if the President sends countless nominees who are part of a particular ideological cast, Democrats will likely exercise their constitutionally given power to deny confirmation so that such nominees do not reorient the direction of the Federal judiciary"). Senator Schumer also publicly vowed that he would not let judicial nominees avoid taking a stand on abortion policy in their confirmation hearings. *See* Ross K. Baker, *Ground Zero in the Culture Wars*, THE STAR-LEDGER, Jul. 22, 2001. This example shows that although the judiciary is an independent institution, the legislative and executive

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> place upon the judicial capacity and that is my reason for having to draw the line.

The Nomination of David Souter to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 101st Congress, Second Session, Serial No. J-101-95 (Sept. 13-19, 1990).

branches are pushing politics into the confirmation process. Overruling the Eighth Circuit's opinion may also have an impact on post-confirmation interviews with judges. Thus, this Court should affirm the Eighth Circuit to avoid these problems.

II. The Judiciary Is Different From the Other Two Branches of Government and Thus Needs Special Rules To Preserve the Independence of the Institution.

The judiciary's unique characteristics support an affirmance of the Eighth Circuit's decision. The judicial branch of the government is *sui generis*. One of the reasons it differs from the other branches is that, unlike the other branches of government, judges are bound to follow the principle of *stare decisis* to decide cases in an impartial manner without succumbing to political pressure or partisanship. Further, it reviews actions taken by the other branches. Thus, the judiciary is not, and should not be, a partisan branch of government beholden to a constituency. A failure to uphold the Eighth Circuit's decision will transform the judiciary into simply another legislature, representing a constituency based on campaign promises. This is especially inappropriate since the judiciary must maintain independence as it reviews the work of the other branches. *See, e.g., U.S. v. Lopez*, 514 U.S. 549, 567 (1995) (invalidating a statute because Congress had gone beyond its Commerce Clause authority).

The State's interest in regulating a judicial candidate's First Amendment rights stems from these differences between judicial candidates and candidates for

other governmental offices. *See In re Chmura*, 608 N.W.2d 31, 39-40 (Mich. 2000); *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) ("states need not treat candidates for judicial office as candidates for other elective offices."). Judges have the unique role in our society of being responsible for the administration of justice, and thus, special rules or regulations governing their elections and campaign speech are necessary. Indeed, the separation of powers principles embraced in both the Federal and the Minnesota Constitutions[5] require the judiciary to remain independent. Thus, Minnesota may, under the Tenth Amendment of the United States Constitution, enact special rules to preserve the integrity of its judiciary.

A. The judiciary is bound by *stare decisis* and therefore is not a legislative body.

The separation of powers principles embraced in the federal and state constitutions authorize and require that Minnesota's Judicial Canon 5 be upheld. In order to maintain the checks and balances system set up in the constitutions under the separation of powers doctrine, the judiciary must remain independent and neutral because, as this Court has recognized, the Framers of the

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[5] The Minnesota Constitution explains that the state government is divided into legislative, executive and judicial departments and specifies that "no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided." MINN. CONST. art. 3, § 1 (West 2001).

federal constitution designed our tripartite form of government to keep each branch "entirely free from the control or coercive influence, direct or indirect, of either of the others." *Bowsher v. Synar*, 478 U.S. 714, 725 (1986). Thus, Minnesota's Canon 5, which is designed to maintain the independence of its judiciary, insures this country's long tradition of judicial neutrality and individualism that is consistent with the founding intent.

To counter this fact, Petitioner Wersal erroneously argues that the Minnesota judiciary is a quasi-legislative body because it helps shape the common law and contends that, as elected officials, judges cannot be held accountable for their actions because of the speech limitations imposed upon them by the Announce Clause. [Petitioner Wersal's Brief at 27]. This argument begins with an overly broad premise: the judiciary does interpret the common law, but is certainly not a legislative body elected to represent a constituency. *See, e.g., Miller v. French*, 530 U.S. 327, 350 (2000) ("separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design").

Instead, the judiciary actually applies the law by employing the principle of *stare decisis*, which means that if an issue of law has been previously decided, there is "a heavy presumption that settled issues of law will not be reexamined." *Equal Emp. Opportunity Comm'n v. Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986). Thus, as a general rule, it is the judiciary's duty to interpret the law, not make it. *See* John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in* Casey; 42 Buff. L. Rev. 187, 201 (1994) (noting that *stare decisis*

requires a judge to follow precedent rather than fashion his or her own rule of law). The doctrine of "*stare decisis* restrains an individualistic, idiosyncratic, or activist judge from injecting his or her own personal mores and beliefs into the law . . . and prevents the infusion of bias" in judicial decision making. *Id.* Contrary to Petitioners' arguments, the principle of *stare decisis*, which increases the perception of the judiciary's independence, impartiality, and legitimacy, works to make the judiciary different from the other branches because the principle establishes that courts respect previous opinions based on reasoning that is in conformity with the rule of law, and do not decide questions based on campaign promises. *Id.* at 199 (citing Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 3-4 (1971)).

At the founding of this nation, the Framers recognized that the judiciary's "independence from political forces . . . helps to promote public confidence in judicial determinations." *See Northern Pipeline Constr. Co.*, 458 U.S. at 60. To insure this independence, the Framers even placed provisions, such as life tenure and fixed compensation, into the Constitution for Article III judges in order to promote judicial individualism.[6] *Id.* at 59. Minnesota's state Constitution provides that the compensation of judges "shall not be diminished during their term of

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[6] Interestingly, even when the branches are forced to interact, the judiciary stays independent. *See, e.g., Bowsher*, 478 U.S. at 722 (noting that at impeachment proceedings, "the presiding officer of the ultimate tribunal is not a member of the Legislative Branch, but the Justice of the United States").

office," and also contains a division of powers clause. MINN. CONST. art. 6, § 5 (West 2001).

At a state level, Minnesota's Canon 5 is merely another provision designed to promote judicial individualism. The independence of the judiciary must be "jealously guarded" because the Constitution unambiguously commands it. *Northern Pipeline Constr. Co.*, 458 U.S. at 60. Minnesota's Canon 5 follows this Constitutional directive. Thus, this Court should affirm the Eighth Circuit and allow Minnesota to further its interest in an independent, impartial judiciary.

B. The Tenth Amendment authorizes States to make special rules for the judiciary because a state election is an independent state government function.

A failure to uphold the Eighth Circuit when the Minnesota Supreme Court has held it would construe the Canon in the same manner as the federal courts[7] would violate the Tenth Amendment and is contrary to this country's long history of embracing the principles of Federalism[8] since Minnesota's Judicial Canons are the

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[7] *See In re Code of Judicial Conduct*, C4-85-697, ORDER (Minn. 2002).

[8] Federalism describes "the constitutionally prescribed division of governmental responsibilities between the state and the national governments." Emily Wheeler, *The Constitutional Right to a Trial Before a Neutral Judge: Federalism Tips the Balance against State Habeas Petitioners*, 51 BROOK. L. REV. 841, 844, n. 7 (1985). Generally, state appellate courts regulate the conduct of judges within their own system, and a "federal inquiry into a

means by which the sovereign state of Minnesota regulates a core function of its government: judicial conduct and the election of judges. The Tenth Amendment[9] to the Federal Constitution "recognizes and preserves the autonomy and independence of the States." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). The underlying principle behind the Tenth Amendment is that the national government will "fare best if the States and its institutions are left free to perform their separate functions their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The Supreme Court has recognized that as part of a state's right to perform its independent core governmental functions,[10] each state has autonomy over its legislative and judicial departments, meaning that the Federal government may interfere with the power of the state only to the extent the Constitution specifically authorizes. *Garcia*, 469 U.S. at 551; *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S.742, 761 (1982) (acknowledging that a State's right to make fundamental decisions and set its own policies is a "quintessential attribute of sovereignty").

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state's administration of its judiciary is hardly routine." *Id.* at 851.

[9] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. CONST. AM. X.

[10] In *Gregory v. Ashcroft*, the court recognized that a state's right to control its judicial elections was a core government function. 501 U.S. 452, 460 (1991).

If a state activity centers around the core functions of the state government, as this one does, then the federal court should defer to the state court. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (explaining that a state's decision in judicial elections should be free from federal interference, subject to Federal Constitutional limits); *Geary v. Renne*, 911 F.2d 280, 301 (9th Cir. 1990) (Rymer J., dissenting) (explaining that states have a great interest in regulating local elections to insulate them from the national issues that are the focus of national political parties). Thus, the decision of the Minnesota Supreme Court is entitled to deference by this Court because state election procedures reflect the very manner in which the state chooses to operate as a government.

As is stated above, Minnesota's Canon preserves the independence of the judiciary and its litigants' Due Process rights to an impartial judge and, under the principles of Federalism, this is an entirely appropriate action. *See, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1396 (1997) (explaining that the Framers recognized that the states would have the primary responsibility for enforcing individual rights and would use their legislative powers to be "jealous guardians" of the rights and liberty of its citizens) (quoting The Federalist No. 26). James Madison explained that the Federal Government should be "disinclined to invade the rights of the individual states." *Garcia*, 469 U.S. at 551 (citing The Federalist No. 46, p. 332 (B. Wright ed. 1961)). Because the Framers intended to avoid federal encroachment on states rights, it is appropriate to allow Minnesota to address election issues concerning the judiciary. *See, e.g., id.* (citing 2 Debates in the Several State Conventions

on the Adoption of the Federal Constitution 438-39 (J. Elliot 2d ed. 1876)). Therefore, the AHC respectfully asks this Court to adhere to the decision of the Minnesota Supreme Court by affirming the Eighth Circuit.

III. Compelling State Interests Support Minnesota's Canon 5.

The AHC concedes that the Minnesota judicial canon at issue impacts the First Amendment rights of judicial candidates and recognizes that there must be a compelling state interest to justify the Canon. *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). However, Canon 5 passes constitutional muster because it is narrowly tailored to meet two compelling state interests. First, Minnesota has a compelling state interest in maintaining the integrity of its judiciary and in ensuring the public's confidence in an independent judiciary. Second, Minnesota has a compelling state interest in preserving the Due Process rights of its litigants, an important interest that Petitioners fail to recognize. These two compelling interests, when weighed against Petitioner's First Amendment rights, justify Canon 5's restriction on campaign speech.

A. Minnesota has a compelling state interest in both maintaining the independence of the judiciary and in preserving the public's confidence in the judiciary's independence.

"There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Comm., Inc. v. Virginia*, 435 U.S. 829, 848 (1978)

(Stewart, J., concurring). States also have a compelling state interest in "the maintenance of public confidence in the objectivity of its judiciary" and in protecting the integrity and independence of the judiciary. *ACLU*, 744 F. Supp. at 1098; *see also Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (noting that States may "properly protect the judicial process from being misjudged in the minds of the public."); *In re Chmura*, 608 N.W.2d at 40 (noting that states have a special interest in regulating the speech of those who seek election to the bench). As one commentator has recognized, proceedings brought under a state's judicial conduct code are intended to "protect the integrity of the judicial system itself." Gross, 36 SYRACUSE L. REV. at 1216.

Petitioner Wersal erroneously argues that Canon 5, designed to protect the integrity of the system, is unconstitutionally vague because it does not specifically draw a line between permissible and impermissible speech. [Petitioner's Brief at 43]. However, a statute is unconstitutionally vague only if it fails to provide "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Canon 5 does not fall into the category of overly vague statutes. Both the purpose of the Canon, and the words of the Canon themselves, make it clear to people of ordinary intelligence that a judicial candidate may not announce his or her views on disputed legal issues that may come before the court so as to avoid tne appearance that he or she has prejudged the case. In an attempt to establish the Canon's vagueness, Petitioners glibly suggest that the number of matters which may

come before the court are infinite. Petitioners also contend that if a candidate discusses judicial philosophy, which is a permissible topic under the Canon, it may be considered a disputed legal issue in some instances. However, as this Court has recognized, anyone with imagination can conjure up hypothetical cases in which the meaning of a statute is called into question. *Id.* at 733. When it is "clear what the ordinance [or Canon] as a whole prohibits," this Court has refused to speculate about possible vagueness in hypothetical situations. *Id.* Words by their nature are imprecise, and if the Canon leaves some room for interpretation, it is because no statute that regulates speech can possibly list all prohibited comments. *See id.* (noting that "we can never expect mathematical certainty from our language"). Thus, the Canon and the activity it regulates is not overly vague.

Furthermore, both the district court and the Eighth Circuit have construed the Canon to have specificity, and the Minnesota Supreme Court has agreed with its interpretation. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 856 (8th Cir. 2001); *In re the Code of Judicial Conduct*, No. C4-85-697 (Minn. Jan. 29, 2002). The Eighth Circuit explained that candidates may not announce their views on disputed legal or political issues, but may still engage in "general discussions of case law or a candidate's judicial philosophy." *Kelly*, 247 F.3d at 882. Candidates may still call attention to their opponents' records and explain their own background and experience to the electorate. *Id.* This Court should affirm the Eighth Circuit's interpretation of the statute because not only has the Minnesota Supreme Court agreed with the interpretation, but

this Court "normally follows lower federal-court interpretations of state law" and "rarely reviews a construction of state law agreed upon by the two lower federal courts." *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). Thus, this Court should defer to the Eighth Circuit's construction of Canon 5, holding that it passes constitutional muster because it is narrowly tailored to meet the compelling governmental interest of independence of the judiciary.

B. Minnesota has a compelling governmental interest in maintaining and preserving the Due Process rights of litigants.

Minnesota has a compelling state interest in ensuring that the Due Process rights of its citizens are preserved. Recent polls suggest that the American public has complained that politics influences judges in their decisions. Judge J. Thomas Greene, *Some Current Causes of Popular Dissatisfaction with the Administration of Justice*, 198 FED. R. DEC. 566, 568 (2000). The current negative public perception of the judiciary demonstrates the importance of Minnesota's Canon 5 and establishes that the Canon is a rule necessary to preserve the Due Process rights of Minnesota's litigants and reverse, or at least stop the furtherance of, this damaging view of the judiciary. A failure to affirm the Eighth Circuit would allow judges to announce their views and give the appearance of a partisan judiciary that lacks impartiality. *See, e.g., Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) ("If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached

after a fair hearing, giving due consideration to the arguments and evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined.").

Judicial impartiality is the keystone in our concept of justice, and the judiciary is expected to decide legal disputes free from the influence of bias and prejudice. *See* John L. Kane, *Judicial Impartiality: Passionate or Comatose?*, THE JUDGES' JOURNAL, 13 (Fall 2001). Litigants have a constitutional right to expect impartiality from their judges. *Stretton*, 944 F.2d at 144 (noting that "taking a position in advance of litigation, it would inhibit the judge's ability to consider the matter impartially" and suggesting that "the campaign announcement would leave the impression that . . . the case was prejudged rather than adjudicated through a proper application of the law to facts impartially determined."); *see also* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996) (explaining that litigants are entitled to judges that decide the cases before them based upon the applicable law and not their campaign promises). Neutrality and impartiality are the cornerstones of the Fourteenth Amendment's right to Due Process, which requires a neutral and detached judge. *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Calif.*, 508 U.S. 602, 617 (1993).

In a criminal context, there is a Sixth Amendment right to an impartial judge. The corresponding right of a civil litigant is found in the Due Process Clause of the Fourteenth Amendment. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); Gross, 36 SYRACUSE L. REV. at 1239. Trial before an unbiased judge is essential to the Due

Process rights guaranteed to all citizens by the Fourteenth Amendment. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). The Framers valued a neutral, and not just independent, judiciary. As John Adams wrote in the Massachusetts Constitution of 1780, every citizen has the right to a trial by judges "as free, impartial and independent as the lot of humanity will admit." Hiller B. Zobel, *Judicial Independence and the Need to Please*, THE JUDGES' JOURNAL 5, 8 (Fall 2001).

Procedural rules used in the trial of a case demonstrate this country's historical efforts to guarantee each litigant a trial by an impartial tribunal. For example, where a potential fact finder is discovered to be biased against a defendant, the prospective juror will be dismissed. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors"). Even in civil cases, it is "fundamental in our jury system that litigants are entitled to unbiased and unprejudiced jurors." *Hill v. Boling*, 523 S.W.2d 867, 873 (Mo. App. – St. Louis 1975); *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986). If all the potential fact finders have the same bias through pretrial publicity, a change in venue will be granted. *See, e.g., State v. Whalen*, 49 S.W.3d 181, 189 (Mo. 2001).

A neutral judge "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall*, 466 U.S. at 242 (citations omitted). Thus, Minnesota's Canon 5, which preserves

the impartiality of the judiciary, a compelling state interest, is constitutional and should be upheld.

C. Canon 5 is narrowly tailored and permits judges to remain active in the bar.

In stressing the importance of judicial independence, the AHC is not suggesting, of course, that isolationism of judges is the answer to need for a neutral judiciary.[11] Writing, researching and participating in community or bar activities are an important part of increasing a judge's knowledge and awareness of the world. *See* Jack Weinstein, *Limits on Judges Learning, Speaking and Acting*,

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[11] However, there is a delicate balance of how much public, extrajudicial speech should be permitted. As one commentator has noted:

> The simplest rule, a flat ban on public, extrajudicial speech by judges on legal topics, makes no sense. A flat ban would have the virtue of clarity and ease of application, but the vice of over-inclusiveness. On the whole, judges are the cream of the legal profession, and it would be a great waste to limit their contribution to the development of law and society. . . .
>
> An equally simple rule, permitting all public, extrajudicial speech, is . . . equally problematic. The judiciary is the most fragile of the three branches and depends upon public and political acceptance of its processes and judgments. It simply would not do to have judges publicly engaging in the sort of freewheeling debate that routinely take place on the floor of the House of Representatives, for example.

J. Clark Kelso, *Time, Place, and Manner Restrictions on Extrajudicial Speech by Judges*, 28 LOY. L.A. L. REV. 851, 854-55 (1995).

36 Ariz. L. Rev. 539, 544 (1994). Lecturing and attending symposiums and conferences on various viewpoints educate judges on emerging trends in the law, adds to the collegiality between the bench and the bar, and improves the judiciary and the legal process generally. *Id.* at 540-555 (discussing the Code of Conduct for federal judges and interpreting it to permit judges to attend conferences, educational programs, and bar association meetings).

Petitioner argues that enforcing Canon 5 to preserve the independence of the bench would engender resentment and suspicion from the public. [Petitioner's Brief at 45]. Petitioner also argues that because judges are elected, there must be a free and open debate about a candidate's ideas. However, the Announce Clause does not silence the judiciary as Petitioner suggests. It merely prevents judges from discussing their views on disputed legal issues that may come before them. Thus, the Announce Clause simply ensures that the public perceives the judiciary to be as neutral as it is.

The public "often associates judges and their conduct with the entire judicial system, and when a judge's conduct is unacceptable, it reflects poorly on the public's perception of the judiciary." Nancy Sholes, *Judicial Ethics: A Sensitive Subject*, 26 Suffolk Univ. L. Rev. 379, 381 (1992). Thus, the perceived integrity of proceedings before the court depends greatly on the neutrality and impartiality of the judge. *See* Wheeler, 51 Brook. L. Rev. at 866. The most effective tool for upholding the integrity of the court is to have judges comply with the state's judicial ethics code. Sholes, 26 Suffolk Univ. L. Rev. at 406. Thus, Minnesota's Canon 5 is the best way to preserve the

integrity of the judiciary, and it is constitutional because it is narrowly tailored to achieve the compelling governmental interest of preserving a litigant's Due Process rights to an impartial and independent tribunal.

D. Due Process and other state interests support slight limitations on First Amendment rights.

Limitations similar to the Announce Clause have been upheld in other aspects of judicial proceedings, such as bans on cameras in the courtrooms and pre-trial gag orders. Similarly, the Announce Clause should also be constitutionally permissible.

For instance, although the media's First Amendment rights are affected when a trial court prohibits cameras in the courtroom, the constitutionality of a ban against cameras has been upheld as a reasonable time, place and manner restriction. *U.S. v. Hastings*, 695 F.2d 1278, 1281-82 (11th Cir. 1983). While the First Amendment generally guarantees the media a right of access to observe and report on criminal trials, "the line is drawn at the courthouse door." *Id.* at 1281 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978)). Courts routinely prohibit cameras in courtrooms for two reasons. First, the maintenance of an orderly, dignified environment free from distractions is appropriate for the solemn nature of judicial proceedings. *U.S. v. Cicilline*, 571 F. Supp. 359, 363 (D. R.I. 1983), *aff'd*, 740 F.2d 952 (1st Cir. 1984). More importantly, the ban insures a fair trial for litigants. *U.S. v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985) (noting that although First Amendment concerns are implicated by denying the media access to criminal trials, the ban is

reasonable because "there is a sense that the knowledge of being televised might cause the judge, jurors or witnesses to be distracted – whether by embarrassment, self consciousness, anxiety or desire to 'star'," and thus, television cameras could actually impair the truth-finding function of the trial).

Likewise, it is permissible to narrow a witness's First Amendment rights when a court issues a gag order prohibiting him from discussing a pending case with the media. Such orders have been upheld when necessary to protect a defendant's right to a fair trial. *See, e.g., In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1983) (concluding that the gag order was constitutional because the potentially inflammatory and prejudicial statements that could be expected from the witnesses had to be suppressed to ensure a fair trial). Gag orders applied to lawyers and the parties have also been upheld as constitutionally permissible when necessary to ensure a fair trial. *See U.S. v. Brown*, 218 F.3d 415, 423 (5th Cir. 2000) (holding that a gag order narrowly drawn to ensure a fair trial does not violate the First Amendment). Thus, courts often balance First Amendment rights with the interests of fair criminal and civil trials. *See id.* at 424.

A ban on campaign speech concerning issues that may come before the court does accommodate a judicial candidate's First Amendment rights with other constitutional values. The restriction should be considered reasonable because it maintains the independence of the judiciary and ensures a litigant's Due Process right to a neutral tribunal in a manner that is analogous to bans on cameras and gag orders. The First Amendment's free speech rights are not absolute and must be applied in the

light of the special characteristics of the relevant environment. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Thus, because of the importance of maintaining an independent judiciary and protecting the Due Process rights of litigants, the Announce Clause should be upheld.

CONCLUSION

For the reasons stated above, *amici* respectfully urge this court to affirm the Eighth Circuit Court of Appeals and uphold the constitutionality of Minnesota's Canon 5.

Respectfully submitted,

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